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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 131

IN THE MATTER OF
MARACHOWSKY STORES COMPANY,
Alleged Bankrupt.

MARACHOWSKY STORES COMPANY,
Petitioner,

vs.

DANIEL C. O'CONNOR, CUSTODIAN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

MAY IT PLEASE THE COURT:

Your Petitioner, Marachowsky Stores Company, respectfully prays that a Writ of Certiorari issue to review the decision and judgment of the United States Court of Appeals for the Seventh Circuit entered on April 13, 1951, which affirmed the order of the District Court dismissing the Petition of December 3, 1949.

SUMMARY AND STATEMENT OF MATTERS INVOLVED.

A petition was filed on November 25, 1947, by Portage Wholesale Company, a debtor corporation through its acting receiver alleging that Marachowsky Stores Company, a Wisconsin corporation was insolvent.

Thereafter the said Marachowsky Stores Company filed an answer to said petition on December 5, 1947.

On January 16, 1948, the hearing on the petition and answer was adjourned for a period of ninety days and by agreement of the parties, Daniel C. O'Connor was appointed custodian of the said Marachowsky Stores Company and qualified as such custodian.

That thereafter the solvency of the alleged bankrupt was tried on January 12, January 13, and March 8 of 1948 and on September 19, 1949.

On November 1, 1949, the Court entered an order dismissing the petition and finding that the corporation was not insolvent. On said November 1, 1949, the Court entered an order reciting that the custodian had filed his full and complete final account. As a matter-of-fact, the custodian did not file his final report and account until February 17, 1950, more than a month after the appeal from the order of the District Court was perfected for the United States Court of Appeals for the Seventh Circuit.

This final account showed a net loss for the twenty-one and one-half month period of operation by the custodian of $14,050.77. His bill for services and disbursements in the sum of $26,668.47 was allowed by the Court. The custodian's fees were computed by the custodian at the rate of $1,200.00 per month for the period of twenty-one and one-half months from January 16, 1948 to November 1, 1949.

Subsequently the District Court entered another order on November 10, 1949, concerning the method of payment of the fees allowed to the custodian.

On December 3, 1949, Marachowsky Stores Company filed a petition for review and rehearing of the orders made on November 1 and November 10, 1949, for the reason that the said fees were excessive. A full and complete hearing was had on this Petition for review on the 15th of December, 1949, and testimony was taken.

The custodian filed no schedule of services rendered by him nor was his final report and account before the court at the time of the allowance of the fees or at the time of the hearing on the petition for review.

On December 23, 1949, the District Court denied the petition for review. Thereafter an appeal was taken to the United States Court of Appeals for the Seventh Circuit.

A fundamental issue is whether or not the District Court could disregard the provisions of Title XI U. S. C. A., Section 76, Paragraph 2 in connection with the method of computing the fees of the custodian and disregard the decisions of the various United States Court of Appeals.

STATEMENT AS TO JURISDICTION OF THIS COURT TO GRANT CERTIORARI.

The jurisdiction of this court is invoked under Title 28, U. S. Code, Section 1254 (Judicial Code Section 1254).

The subject matter involved is the interpretation of a federal statute—Title XI U. S. C. A. 76, Paragraph 2. The decisions of the various United States Court of Appeals are in conflict.

STATUTE INVOLVED.

The Statute involved is Title XI U. S. C. A. 76, Paragraph 2.

DATE OF JUDGMENT SOUGHT TO BE REVIEWED.

The decision sought to be reviewed is that of the United States Court of Appeals for the Seventh Circuit entered on April 13, 1950 (The said decision has not been reported as yet) (Rec. 69).

The decision of the Court of Appeals for the Seventh Circuit sustains the order of the District Court for the Western District of Wisconsin entered on December 23, 1949 (Rec. 48).

A Petition for Rehearing was denied by the United States Court of Appeals for the Seventh Circuit on May 21, 1951.

QUESTIONS PRESENTED.

1. Does Title XI U. S. C. A. 76, Paragraph 2, give the District Court the right to disregard the formula promulgated in the said Statute in determining the fees of a custodian and fix an arbitrary and unconscionable fee?

2. Does the court have a right to fix fees of a custodian without regard to the formula promulgated in the said sections of the statute of the United States and without any evidence in support of the time consumed and other factors in connection with the operation of the petitioner's business and without any schedule of time spent in the conduct of the petitioner's business while in the possession of the said custodian?

3. Does the District Court have a right to disregard the fact that when the custodian returned the assets to the petitioner after the order was entered holding the petitioner solvent with a loss of in excess of $14,000.00 to be allowed a fee of $25,000.00 or at the rate of $1,200.00 per month and disregard the offer of proof to show that the custodian had no experience in the operation of a grocery business and refusing to admit copies of his income tax returns for the State of Wisconsin showing his earning capacity prior to the appointment as custodian?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The issue in these proceedings is whether or not the allowance for services and disbursements by the custodian in the amount of $26,668.47 in spite of a loss to the business during the custodianship amounting to $14,050.77 was a reasonable fee for the custodian for his operation of the business for a period of twenty-one and one-half months.

The allowance of the $25,800.00 as a fee to an inexperienced custodian was excessive. The policy of the Bankruptcy Act is that the administration of an estate shall be held at a minimum of expense.

Receivers' commissions are not computed on the gross amount of business done.

As far as we have been able to ascertain the authorities which sustain the petitioner's petition are as follows:

11 U. S. C. A. 76.

In re New York Commercial Co., 231 Fed. 445.

In re Higgin Mfg. Co., 19 F. Supp. 120, Syl. 1.

In re Smith, 108 Fed. 39.

In re Detroit Mortgage Corp., 12 F. (2d) 889, Syl. 3.

Bailie v. *Rossell*, 60 F. (2d) 806.

In re 2747 Milwaukee Ave. Bldg. Corp., 12 F. Supp. 557, 562.

Eames v. *H. B. Claflin Co.*, 231 Fed. 693.

Dunlap Hardware Co. v. *Huddleston*, 167 Fed. 433, 434.

THE QUESTIONS INVOLVED.

The questions involved are:

I.

Does Title XI U. S. C. A. 76, Paragraph 2, give the District Court the right to disregard the formula promulgated in the statute in determining the fees of a custodian and fix an arbitrary and unconscionable fee?

11 U. S. C. A. 76 reads as follows:

"a. The compensation of receivers appointed under this title, for their services payable after they are rendered, shall be as follows:

* * * * *

(2) WITH FULL POWERS. Receivers appointed pursuant to clause (3) of section 11 of this title who serve otherwise than as mere custodians shall receive compensation by way of commissions upon the moneys disbursed or turned over to any persons, including lienholders, by them and also upon the moneys turned over by them or afterward realized by the trustees from property turned over in kind by them to the trustees, such amount as the court may allow, but in no event to exceed 6 per centum on the first $500 or less, 4 per centum on all in excess of $500 but not more than $1,500 2 per centum on all above $1,500 and not more than $10,000.00, and 1 percentum on all above $10,000.

II.

Does the court have a right to fix fees of a custodian without regard to the formula promulgated in the said sections of the statute of the United States and without any evidence in support of the time consumed and other factors in connection with the operation of the petitioner's business and without any schedule of time spent in the conduct of the petitioner's business while in the possession of the said custodian?

11 U. S. C. A. 76 reads as follows:

> "(3) CONDUCTING BUSINESS. Receivers appointed pursuant to clause (3) of section 11 of this title who conduct the business of the bankrupt as provided in clause (5) of section 11 of this title, shall receive such amount as may be allowed by the court, but in no event to exceed twice the maximum allowance permitted by paragraph (2) of this subdivision a."

In re New York Commercial Co., 231 Fed. 445, it was held that trustees' commissions were to be figured only on a profit of $50,000.00 made by them and not on the total volume of business transacted, which was about $900,000.00.

> "When bankruptcy trustee did not distribute to creditors of bankrupt or other persons any money derived from original assets or from profits accrued from business operations conducted by him, and upon his resignation merely turned over to his successor trustee original assets of the estate in kind, resigning trustee held not entitled to compensation based on commission or volume of money handled in conducting or operating the business enterprise of the bankrupt."
>
> *In re Higgin Mfg. Co.,* 19 F. Supp. 120, Syl. 1.

In re Smith, 108 Fed. 39, it was held that referees and trustees are entitled to commissions only "on sums to be paid as dividends and commissions" and not on the gross amount collected.

"A receiver is not entitled to commissions on property turned back to an alleged bankrupt on dismissal of the petition." *In re Detroit Mortgage Corp.*, 12 F. (2d) 889, Syl. 3.

III.

Does the District Court have a right to disregard the fact that when the custodian returned the assets to the petitioner after the order was entered holding the petitioner solvent with a loss of in excess of $14,000.00 to be allowed a fee of $25,000.00 or at the rate of $1,200.00 per month and disregard the offer of proof to show that the custodian had no experience in the operation of a grocery business and refusing to admit copies of his income tax returns for the State of Wisconsin showing his earning capacity prior to the appointment as custodian?

Originally the defendant custodian in this matter was appointed to serve for a period of ninety days. It was believed that the matter could be settled as between the parties, and, therefore, a stipulation was entered into to that effect. Actually the custodianship lasted twenty-one months and fifteen days, from January 16, 1948, to November 1, 1949. The defendant custodian himself testified that prior to his appointment as custodian in this matter he had had no grocery experience of any kind, had never done any work in connection with a grocery store and was not familiar with the purchase of groceries or similar products. The orders allowing the custodian's compensation were entered on November 1 and November 10, 1949. The custodian's final report to the court was filed on February 17, 1950, over a month after this appeal was perfected. In that final report, the custodian showed a net loss of $14,050.77 for the period of custodianship. This is the result of twenty-one and a half months' operation under the

defendant's supervision. In addition, five of the nineteen stores of the petitioner were liquidated on motion of the custodian, during the period of the custodianship.

As custodian the defendant employed Mr. York who supervised the stores for him. His own testimony shows that he did about what a board of directors of a corporation would do. He continued to practice law during the time he was custodian.

It must be remembered that the petitioner was thrown into this bankruptcy proceeding by hostile creditors, that the stores were operating on a "shoestring" and had had some financial difficulties. However, the petitioner was not insolvent and the court so found on November 1, 1949, after trial. Previously the court had written a letter to one of the petitioner's attorneys and stated that he would be inclined to fix the custodian's compensation at $800.00 per month. From the small amount of testimony in the transcript, it is apparent that the court was prejudiced against the petitioner and allowed other matters that he had heard to influence him in his treatment of the question of the custodian's compensation.

With a loss of over $14,000.00, as shown in the custodian's final account, the liquidation of five store units in the petitioner's chain of stores and the order to pay $25,800.00 plus disbursements to the custodian, the petitioner, although found solvent in this proceeding, might be driven into bankruptcy as a result.

> "The controlling considerations in fixing a receiver's compensation are the fair value of the time and labor required in the performance of his duties, as measured by ordinary business standards, and the degree of activity, integrity and dispatch with which the work has been performed. *Bailie* v. *Rossell*, 60 F. (2d) 806." *In re 2747 Milwaukee Ave. Bldg. Corp.*, 12 F. Supp. 557, 562.
>
> "Furthermore, the trustee has no absolute right, in

any event, to full commissions. The statute merely prescribes a maximum and within that limit the allowance is to be adjusted to the services performed, consistent with economical administration and in the light of the results accomplished." *In re Higgin Mfg. Co.*, 19 F. Supp. 120, 123.

In *Eames* v. *H. B. Claflin Co.*, 231 Fed. 693, two receivers were appointed by the court to operate the business of the H. B. Claflin Company. As of the date of appointment, the assets of the alleged bankrupt totaled $55,000,000.00. During the eight months' period of receivership some $30,000,000.00 in assets passed through their hands. The court allowed a total of $66,000.00 to the receivers as compensation. In the case at bar, the custodian handled about 1/10th of the amount of money involved in the above case and yet was awarded better than ⅓ of the compensation allowed in the *Claflin* case.

"The question of allowance of compensation to receivers and attorneys is largely committed to the sound discretion of the court under whose direction the services are performed." *Dunlap Hardware Co.* v. *Huddleston*, 167 Fed. 433, 434.

Conclusion.

In setting forth Petitioner's reasons for the granting of a Writ of Certiorari, we have attempted to limit the discussion to indicate the fact that there are important questions of federal law concerning the sections of the Chandler Act hereinbefore set forth, which have not been and should be settled by the Supreme Court. The petitioner is not appending a supporting brief or argument on any of the other propositions of law or fact involved in the interest of brevity and for the reason that such a brief may deal with the merits which is a discussion not contemplated by the Rules of this Court in a Petition for a Writ of Certiorari.

The Petitioner believes that this Petition sets forth important questions of federal law which, in the public interest, requires the granting of a Writ of Certiorari as herein prayed.

In the event this prayer is granted, the Petitioner desires to submit a brief fully discussing the issues raised in this petition.

Respectfully submitted,

MARACHOWSKY STORES COMPANY,
Petitioner,

By DAVID A. CANEL,
10 South La Salle Street,
Chicago 3, Illinois,
Counsel for Petitioner.

LEONARD A. CANEL,
Of Counsel.

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DANIEL C. O'CONNOR,
120½ West Cook Street,
Portage, Wisconsin,
Respondent, in Proper Person.

THE BUNTHORP-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

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1. Petitioner cites no cases indicating that the decisions of the various United States Courts of Appeal are in conflict with the interpretation of Title XI, U. S. C. A. 76 (2)..... 3

2. Petitioner has indicated by the arguments made in its Petition that it is attempting to have this court review the facts. Under the Supreme Court Rule 38, a Writ of Certiorari will not be issued to review disputed issues of fact 4

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ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MAY IT PLEASE THE COURT:

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Daniel C. O'Connor, respondent, appearing in proper person in the above entitled action, does herewith file his brief and argument in answer to the petition of the Marachowsky Stores Company for a Writ of Certiorari to review the decision and judgment of the United States Court of Appeals for the Seventh Circuit.

> Treatise, holding that commissions are to be allowed on the total disbursements made rather than upon such profits as can be disbursed, see *Albers* v. *Dickinson* (C. C. A. 8th, 1942), 49 Am. B. R. (NS) 343, 127 F. (2d) 957. • • •"

Answering a specific request for instruction by a referee the court in the case of *In re Morris Bros.*, 8 Fed. (2d) 629, held that the computation of the percentage was on entire amount of money disbursed.

In re New York Commercial Co., 231 Fed. 445, cited by appellant as authority for computing commissions on the basis of profits only, actually was decided on the basis that there was only $50,000.00 disbursed.

At page 447 of the reported case Judge Coxe says:

> "The facts are stated in the opinion of Judge Augustus N. Hand and need not be repeated here. We agree with him that it cannot be said that the trustee disbursed the money received from the sale of rubber except as to the $50,000.00 profit upon which commissions were allowed."

It is respectfully submitted that the above cited authorities indicate that there is no conflict of the interpretation of the statute; that petitioner knows, or ought to know, that there is no conflict as alleged and that, therefore, the escapable conclusion is that the Petition for Writ of Certiorari was sued out merely for delay.

(2) Petitioner Has Indicated by the Arguments Made in Its Petition That It Is Attempting to Have This Court Review the Facts. Under the Supreme Court Rule 38, a Writ of Certiorari Will Not be Issued to Review Disputed Issues of Fact.

The questions stated under the heading Questions Presented (Petition for Writ, page 5) and the Reasons Relied on for Allowance of the Writ (Petition for Writ, page 6)

clearly indicate that the petitioner would have the court review the facts. The court's attention is directed to the following quotes from page 6 of the Petition for Writ of Certiorari: "The issue is whether or not the allowance for services and disbursements * * * was reasonable * * *". "The allowance of $25,800.00 as a fee was excessive * * *". The court's attention is further directed to petitioner's Argument 3, which refers only to petitioner's interpretation of certain evidence and arguments considered by the Trial Court in fixing the compensation, which are not proper arguments to make to this Court for a Writ of Certiorari.

Conclusion.

In conclusion it is submitted that despite petitioner's pious statement of intention "* * * to limit the discussion to indicate that there are important questions of Federal law concerning the sections of the Chandler Act hereinbefore set forth * * *" petitioner has failed to make any argument or to cite any cases showing a conflict of interpretation among the Circuit Courts of Appeal, but has, by arguing matters not proper in this proceeding, shown the barrenness of its position. It appears then that this proceeding has been sued out merely for delay, and it is respectfully submitted that the court should exercise its discretion and make an allowance for damages by way of a percentage on the amount of the judgment pursuant to paragraph 2, Rule 30 of the rules of this Court.

Respectfully submitted,

DANIEL C. O'CONNOR,
Respondent, in Proper Person.